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14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 Chosen Figure LLC,

17 Plaintiff,

18 vs.

19 Kevin Frazier Productions, Inc.,

20 Defendant.

Case No. 2:22-cv-06518 MEMF (MAAx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION TO  
DISMISS COMPLAINT**

[Notice of Motion and Motion to Dismiss,  
Request for Judicial Notice, and  
Declaration of Aleeza L. Marashlian with  
Exhibits 1-2 filed concurrently]

Date: January 19, 2023

Time: 10:00 a.m.

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Judge: Hon. Maame Ewusi-Mensah  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiff Chosen Figure LLC (“Plaintiff”) asserts it owns the copyrights associated with a paparazzi photograph depicting the recording artists Rihanna and A\$AP Rocky in heavy jackets and medical masks taken on the streets of New York City, registered with the Copyright Office on January 15, 2021, Registration No VA 2-233-243. Compl. 3:25-27, 4:5-7. Plaintiff, according to Copyright Registration No VA 2-233-243, is an “employer for hire,” though Plaintiff alleges in its complaint that it, as a limited liability company, is a “professional photographer by trade.” Defendant’s Request for Judicial Notice [hereinafter Def.’s RJN], Ex. 1; Compl. 3:8. Plaintiff’s photograph was subsequently used by the recording artist Lil Uzi Vert in an Instagram Stories post made to his account, onto which Lil Uzi Vert superimposed the comment “Can’t be true.” See Def.’s RJN, Ex. 2, Jasmine Simpkins, *Lil Uzi Vert unfollows Crush Rihanna Because She’s Dating A\$AP Rocky*, Hip Hollywood (Dec. 3, 2020) <https://www.hiphollywood.com/2020/12/lil-uzi-vert-unfollows-crush-rihanna-because-shes-dating-aap-rocky/>.

Defendant Kevin Frazier Productions, Inc. (“Defendant”) owns the Black-focused entertainment news website Hip Hollywood, displayed at URL address hiphollywood.com. On December 3, 2020, Hip Hollywood published an article expressly about Lil Uzi Vert’s “devastated” reaction to the news of Rihanna and A\$AP Rocky dating, illustrating the article with, *inter alia*, a screenshot of Lil Uzi Vert’s Instagram Stories post. Def.’s RJN, Ex. 2. Critical to this motion and fatal to Plaintiff’s claims, the article is *about* Lil Uzi Vert’s reaction to this news, stating that the rapper “shared his shock and disbelief on social media” by making the post with his superimposed comment and unfollowing Rihanna on Instagram. *Id.*

Plaintiff asserts that Hip Hollywood’s use of the screenshot of Lil Uzi Vert’s Instagram Stories post of Plaintiff’s photograph of Rihanna and A\$AP Rocky superimposed with his commentary renders Defendant liable to Plaintiff for

copyright infringement. Compl. 4:24-27. However, as shown in the near-parallel circumstances examined in *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570, 575 (S.D.N.Y. 2020), *reconsideration denied*, 565 F. Supp. 3d 400 (S.D.N.Y. 2021), as well as subsequent analogous decisions that have followed *Walsh*, Defendant’s use here is fair and therefore not subject to an infringement action under the Copyright Act. *See* 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”). On this basis, Plaintiff’s copyright infringement claim fails and should be dismissed. *See infra* Section III.A.

## II. LEGAL STANDARD

### A. RULE 12(B)(6)

Under Federal Rules of Civil Procedure, Rule 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The non-moving party bears the burden of alleging “enough facts to state a claim to relief that is on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). The complaint is considered in its entirety, “as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007).

### B. DEFENDANT’S REQUEST FOR JUDICIAL NOTICE

“When ruling on a motion to dismiss, a court may take judicial notice of registrations with the Copyright Office as well as court documents already in the public record.” *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*, No. 15-cv-04084-CRB, 2018 U.S. Dist. LEXIS 39341, at \*21 (N.D. Cal. Mar. 8, 2018); *see*

1 *also Ajaxo, Inc. v. Bank of Am. Tech. & Operations, Inc.*, No. 2:07-CV-945-GEB-  
2 GGH, 2007 U.S. Dist. LEXIS 89969, at \*2 (E.D. Cal. Nov. 21, 2007).

3 Similarly, “[p]ublically accessible websites and news articles are proper  
4 subjects of judicial notice.” *Diaz v. Intuit, Inc.*, No. 5:15-cv-01778-EJD, 2018 U.S.  
5 Dist. LEXIS 82009, at \*11 (N.D. Cal. May 15, 2018) (citations omitted). Moreover,  
6 complete copies of documents whose contents are alleged in the complaint may be  
7 considered in connection with a motion to dismiss pursuant to Federal Rules of  
8 Civil Procedure, Rule 12(b)(6). *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4  
9 (9th Cir. 1996); *see also E. Side Plating, Inc. v. City of Portland*, No. 3:18-cv-  
10 01664-YY, 2019 U.S. Dist. LEXIS 144005, at \*11-12 (D. Or. July 11, 2019)  
11 (“Here, plaintiff repeatedly refers to Ordinance No. 187591 in the Complaint but  
12 attached only select portions of the ordinance as an exhibit. In support of its motion  
13 to dismiss, defendant has provided a complete copy of the ordinance and asks the  
14 court to take judicial notice of it in its entirety. [Citations.] The complaint  
15 references the document, the ordinance is central to plaintiff’s claims, and no party  
16 questions the authenticity of the copy of the ordinance that defendant has provided.  
17 Accordingly, the court takes judicial notice of Ordinance No. 187591.”).

18 Lastly, courts take judicial notice of online materials such as Instagram posts  
19 where the authenticity of such content is either not in dispute or such internet  
20 postings were expressly incorporated by reference into the plaintiff’s complaint.  
21 *See, e.g., Wright v. BuzzFeed, Inc.*, No. 2:18-cv-02187-CAS (AFMx), 2018 U.S.  
22 Dist. LEXIS 93641, at \*2 n.1 (C.D. Cal. June 4, 2018) (taking judicial notice of  
23 eight photographs posted to an Instagram account); *Young v. Greystar Real Estate*  
24 *Partners, LLC*, No. 3:18-cv-02149-BEN-MSB, 2019 U.S. Dist. LEXIS 149731, at  
25 \*3-4 (S.D. Cal. Aug. 31, 2019) (taking judicial notice of Instagram and Facebook  
26 posts because the complaint specifically described the posts); *see also Boesen v.*  
27 *United Sports Publications, Ltd.*, No. 20CV1552ARRSIL, 2020 WL 6393010, at \*5  
28 (E.D.N.Y. Nov. 2, 2020) (taking judicial notice of Facebook posts where the



1 authenticity of such post was not contested).

2 Courts may consider facts, including the existence and content of publicly  
3 available documents, that are subject to judicial notice in deciding motions under  
4 Federal Rules of Civil Procedure, Rule 12. *See generally* Def.’s RJN 1-3 (providing  
5 authority). Accordingly, Defendant requests that the Court take judicial notice of  
6 the exhibits offered in support of its motion to dismiss (Def.’s RJN, Exs. 1-2),  
7 which consist of (1) a record from the Copyright Office and (2) Defendant’s news  
8 article at issue, the contents of which are alleged in the complaint, and which is  
9 posted to a publicly available website noticeable pursuant to Federal Rule of  
10 Evidence 201.

### 11 **III. ARGUMENT**

#### 12 **A. DEFENDANT HAS MADE FAIR USE OF PLAINTIFF’S PHOTOGRAPH**

13 “Recognizing that science and art generally rely on works that came before  
14 them and rarely spring forth in a vacuum, the [Copyright] Act limits the rights of a  
15 copyright owner regarding works that build upon, reinterpret, and reconceive  
16 existing works.” *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 799 (9th  
17 Cir. 2003); *see also Tresóna Multimedia, Ltd. Liab. Co. v. Burbank High Sch.*  
18 *Vocal Music Ass’n*, 953 F.3d 638, 647 (9th Cir. 2020) (“the fair use defense renders  
19 a use non-infringing, and has long served as an important defense in copyright  
20 law.”). A determination whether a use is fair can be made at the motion to dismiss  
21 stage where both works at issue are before the court. *See Draftexpress, Inc. v.*  
22 *Whistle Sports, Inc.*, No. CV 22-488-DMG (AGRx), 2022 U.S. Dist. LEXIS  
23 138528, at \*5-6 (C.D. Cal. Aug. 2, 2022); *City of Inglewood v. Teixeira*, No. CV-  
24 15-01815-MWF (MRWx), 2015 U.S. Dist. LEXIS 114539, at \*19-20 (C.D. Cal.  
25 Aug. 20, 2015) (collecting cases); *Sedgwick Claims Mgmt. Servs. v. Delsman*, No.  
26 C 09-1468 SBA, 2009 U.S. Dist. LEXIS 61825, at \*11-12 (N.D. Cal. July 16,  
27 2009) (same); *see also Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (citing  
28 *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012).



1 Plaintiff has attached a copy of the photograph over which it asserts copyright  
 2 protection as Exhibit 1 to its complaint, and this Court may take judicial notice of  
 3 the Hip Hollywood article that purportedly infringes on Plaintiff's copyrights, thus  
 4 both works at issue are before this Court and ripe for a determination whether  
 5 Defendant's use is non-infringing. Compl., Exh. 1; Def.'s RJN, Ex. 2.

6 Here, Defendant's use falls squarely within the bounds of fair use, as  
 7 examined by *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570, 575  
 8 (S.D.N.Y. 2020), *reconsideration denied*, 565 F. Supp. 3d 400 (S.D.N.Y. 2021). In  
 9 *Walsh*, the online website XXL Mag used a photograph authored by the plaintiff of  
 10 recording artist Cardi B. *Id.* at 576. However, that photograph was used in the  
 11 context of an Instagram post made by Cardi B, which combined both the  
 12 photograph of herself, a post made by third-party Tom Ford Beauty advertising a  
 13 Cardi B namesake lipstick, and a header authored by Cardi B stating "Cardi B's  
 14 Tom Ford Lipstick has already SOLD OUT!!!," to which Cardi B. commented  
 15 "Sorry ./....." *Id.* at 576–78. The article accompanying the image reported about the  
 16 Cardi B post. *Id.* at 576. *Walsh* has been repeatedly followed in subsequent district  
 17 court opinions analyzing fair use on a motion to dismiss for analogous fact patterns.  
 18 *See, e.g., Boesen*, 2020 U.S. Dist. LEXIS 203682, at \*8 ("I agree with [*Walsh's*]  
 19 reasoning and apply it here."); *Whiddon v. Buzzfeed, Inc.*, 2022 U.S. Dist. LEXIS  
 20 197694, at \*17 (S.D.N.Y. Oct. 31, 2022) (following *Walsh* and *Boesen*). These on-  
 21 point decisions should be adopted as persuasive authority. *See Steward v. West*, No.  
 22 CV 13-02449 BRO (JCx), 2014 U.S. Dist. LEXIS 186012, at \*21 (C.D. Cal. Aug.  
 23 14, 2014) (finding "[t]wo cases from the Southern District of New York dealing  
 24 with similar issues are instructive" in the context of copyright analysis).

25 Hip Hollywood used a screenshot of Lil Uzi Vert's Instagram Stories post  
 26 featuring the photograph at issue, to which Lil Uzi Vert superimposed his comment  
 27 "Can't be true." Def.'s RJN, Ex. 2. Hip Hollywood's accompanying article is  
 28 expressly about Lil Uzi Vert's Instagram post, which illustrated its article that the

1 rapper, using Instagram, “shared his shock and disbelief on social media” by  
2 making the post with his superimposed comment and unfollowing Rihanna on  
3 Instagram. *Id.* Because the article’s focus was on the fact that Lil Uzi Vert had  
4 disseminated Plaintiff’s photograph, it constitutes paradigmatic fair use. *Compare*  
5 *Walsh*, 464 F. Supp. 3d at 583–84 (“Defendant embedded the entire Instagram  
6 Post... along with Cardi B’s caption and various Instagram standard links, making  
7 clear that the subject of the image was the Post, not the Photograph.”); *Boesen*,  
8 2020 U.S. Dist. LEXIS 203682, at \*9 (E.D.N.Y. Nov. 2, 2020) (“The article did not  
9 use plaintiff’s photograph ‘as a generic image’ of Wozniacki... Rather, it embedded  
10 the Instagram post announcing her retirement—which incidentally included the  
11 photograph—because ‘the fact that [Wozniacki] had disseminated’ that post ‘was  
12 the very thing the Article was reporting on.’”); *Whiddon*, 2022 U.S. Dist. LEXIS  
13 197694, at \*18 (“The focus of the article is Ms. Mitchell’s decision to disseminate  
14 the Photographs of her accident, and the resulting critique of that decision.  
15 BuzzFeed’s use of screenshots, which include all the elements of the Post, such as  
16 the Instagram branding and Ms. Mitchell’s caption, make absolutely clear that the  
17 focus of its reporting is on the Post and the controversy.”).

18 At all times, the Hip Hollywood article’s focus is on Lil Uzi Vert’s reaction  
19 to seeing and subsequent dissemination of Plaintiff’s photograph, only pausing to  
20 snarkily comment about how the author of the photograph even knew it depicted  
21 Rihanna, as she is wearing a “sleeping bag”-style hooded winter coat and her face is  
22 obscured by a medical mask, a baseball cap, and the coat’s hood. Def.’s RJN, Ex. 2.  
23 The article continues, reporting news that Lil Uzi Vert has since made amends with  
24 his on-again-off-again girlfriend JT and gifted her a luxury car upgrade for her  
25 birthday. *Id.* The Hip Hollywood article was not about the news of Rihanna and  
26 A\$AP Rocky’s romantic relationship, nor did the photograph illustrate an article  
27 about that news. In fact, in its first sentence, the article links to another, separate  
28 Hip Hollywood article about the Rihanna-A\$AP Rocky relationship news. *Id.*

1 As its basis for the instant motion, Defendant asserts that using a screenshot  
2 of Lil Uzi Vert’s Instagram Stories post that, in turn, used Plaintiff’s paparazzi  
3 photograph is protected from liability by the fair use doctrine under the Copyright  
4 Act. Section 107 provides four factors to consider in determining whether fair use is  
5 an available defense: (1) the purpose and character of the use; (2) the nature of the  
6 copyrighted work; (3) the amount and substantiality of the portion used in relation  
7 to the copyrighted work as a whole; and (4) the effect of the use upon the potential  
8 market for or value of the copyrighted work. 17 U.S.C. § 107. The factors are not to  
9 be analyzed in isolation, but “weighed together, in light of the purposes of  
10 copyright” and the facts of a given case. *Campbell v. Acuff-Rose Music, Inc.*, 510  
11 U.S. 569, 578 (1994); *see Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir.  
12 2003) (noting that courts must “balance these factors in light of the objectives of  
13 copyright law, rather than view them as definitive or determinative tests.”). Ruling  
14 on a Federal Rules of Civil Procedure, Rule 12(c) motion, the *Walsh* court applied  
15 the four fair use factors. *Walsh* at 580-86.

### 16 **1. Purpose and Character of Use**

17 As the Supreme Court has explained, the question posed by the first fair use  
18 factor is whether a defendant’s work “merely ‘supersede[s] the objects’ of the  
19 original creation... or instead adds something new, with a further purpose or  
20 different character, altering the first with new expression, meaning, or message; it  
21 asks, in other words, whether and to what extent the new work is ‘transformative.’”  
22 *Campbell*, 510 U.S. at 579. Transformative works “lie at the heart of the fair use  
23 doctrine’s guarantee of breathing space within the confines of copyright.” *Id.*  
24 Therefore, a work is considered transformative if “new expressive content or  
25 message is apparent.” *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir.  
26 2013); *see also Cariou*, 714 F.3d at 708 (artist’s altering of photographs were  
27 transformative because they had a “fundamentally different aesthetic”); *Kelly*, 336  
28 F.3d at 818–20 (use of photographs as thumbnail images in a search engine was

1 transformative because it had a different purpose than the original artwork). “[T]he  
2 more transformative the new work, the less will be the significance of other factors  
3 . . . that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579.

4 The *Walsh* court found that the first factor favored fair use in that XXL Mag  
5 used the photograph at issue “for an entirely different purpose than originally  
6 intended.” *Walsh* at 581. The purpose of the original photograph was to depict  
7 Cardi B at a fashion show, while XXL Mag used it to report on Cardi B’s Instagram  
8 Post, and the “[p]ost, not the image that was posted, was ‘itself the subject of the  
9 story.’” *Walsh* at 582 (quoting *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297  
10 F. Supp. 3d 339, 352 (S.D.N.Y. 2017)). The court found that XXL Mag published  
11 Cardi B’s post to provide its readers with the social media interactions that were the  
12 subject of its article, and that the plaintiff’s photograph was a necessary part of  
13 Cardi B’s post. On this basis, the court found that the originally intended function  
14 of the photograph “was wholly ‘transform[ed] ... in [its] new context,’ and as a  
15 result the Article’s publication of the Post in no way ‘merely supersedes’ the  
16 original work.” *Walsh* at 583 (citations omitted, brackets and ellipses original)  
17 (quoting *Barcroft Media, Ltd.* at 352; *Campbell* at 579); accord *Boesen*, 2020 U.S.  
18 Dist. LEXIS 203682, at \*8-9; *Whiddon*, 2022 U.S. Dist. LEXIS 197694, at \*15.

19 Here, Plaintiff’s photograph depicts Rihanna and A\$AP Rocky on the street  
20 together. That is its purpose: to depict the two celebrities together. Comparatively,  
21 the purpose of Hip Hollywood’s use was to report on Lil Uzi Vert’s Instagram post  
22 reacting to and commenting on the photograph and the status of Lil Uzi Vert’s  
23 romantic life more generally. The originally intended function of the photograph  
24 does not and cannot possibly be Lil Uzi Vert’s Instagram post and superimposed  
25 comment about his disappointment that Rihanna and A\$AP Rocky were  
26 photographed together. This factor thus weighs in favor of Defendant.

## 27 **2. Nature of Copyrighted Work**

28 The second fair use factor examines whether the work in suit is of a type

1 “closer to the core of intended copyright protection.” *Campbell*, 510 U.S. at 586.  
2 This factor tips in favor of fair use when the work’s primary use is informational  
3 rather than creative. *Kelly*, 336 F.3d at 820; *see Los Angeles News Service v. CBS*  
4 *Broadcasting, Inc.*, 305 F.3d 924 (9th Cir. 2002) (re-publication of news report was  
5 a fair use because it was informational rather than creative); *Barcroft Media, Ltd.*,  
6 297 F. Supp. 3d at 354 (“Although photography, including photography of a  
7 celebrity walking around in public, certainly involves skill and is not devoid of  
8 expressive merit, [paparazzi images] are further from the core of copyright  
9 protections than creative or fictional works would be.”) *see also Equals Three, LLC*  
10 *v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1106 (C.D. Cal. 2015) (“The Ninth  
11 Circuit has recognized that a ‘point-and-shoot’ photograph is not on the same level  
12 as the works of famous photographers.”) (quoting *Monge v. Maya Mags., Inc.*, 688  
13 F.3d 1164, 1177 (9th Cir. 2012). “In assessing this factor, ‘courts consider whether  
14 a work is creative versus factual, and unpublished versus published, with copyright  
15 protections applying more broadly to creative and unpublished works.’” *Walsh* at  
16 585 (quoting *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d  
17 395, 408 (S.D.N.Y. 2016)). Ultimately, however, “this factor is not terribly  
18 significant in the overall fair use balancing.” *Calkins v. Playboy Enterprises Int’l,*  
19 *Inc.*, 561 F. Supp. 2d 1136, 1142 (E.D. Cal. 2008). This is particularly true in the  
20 context of reporting on a social media post. *Whiddon*, 2022 U.S. Dist. LEXIS  
21 197694, at \*22 (“under these circumstances, the Court assigns this second statutory  
22 factor much less heft than the first.”).

23 In *Walsh*, the court found that this factor favored the defendants too, on the  
24 basis that when examining a paparazzi photograph, “‘the degree of creativity a  
25 relatively neutral consideration’” and the fact that the photograph was previously  
26 published. *Walsh* at 585 (quoting *BWP Media USA, Inc.* at 408).

27 After Plaintiff’s photograph was initially published, Lil Uzi Vert reposted the  
28 photograph to his Instagram Stories, superimposing his commentary. Then, Hip

1 Hollywood used the image of Lil Uzi Vert’s post to illustrate its article about that  
2 very same post. Thus, the fact that Plaintiff’s photograph had been previously  
3 published, alongside the “relatively neutral” creative aspects of the work and the  
4 transformative nature of Hip Hollywood’s use, supports Defendant’s fair use.  
5 Accordingly, the second fair use factor weighs in favor of Defendant.

### 6 **3. Amount and Substantiality Used**

7 The third fair use factor considers the quality and quantity of the work taken.  
8 *Campbell*, 510 U.S. at 586–87. The “extent of permissible copying varies with the  
9 purpose and character of the use. *Id.* at 586. “If the secondary user only copies as  
10 much as is necessary for his or her intended use, then this factor will not weigh  
11 against him or her.” *Kelly*, 336 F.3d at 820–21. As such, even reproducing an entire  
12 work does not weigh against fair use if it was “reasonable to do so in light of [] the  
13 purpose for using [the work].” *Calkins*, 561 F. Supp. 2d at 1143 (“it was necessary  
14 for PEI to copy the entire Photograph in order to personalize Shannon by showing  
15 Playboy readers how Shannon looked as a high school senior. To use a lesser  
16 portion of the Photograph would have defeated PEI’s purpose for using it”).

17 When finding that this factor weighed in favor of the defendant, the *Walsh*  
18 court explained that the Cardi B Instagram post “is the only image that could have  
19 accomplished XXL Mag’s journalistic objective of describing a social media story  
20 and providing readers with the relevant posts. Even the Photograph itself, on its  
21 own, would not have been a reasonable substitute. Further, within its objective,  
22 Defendant used only as much of the Photograph as was already included in Cardi  
23 B’s Post; in other words, ‘no more was taken than necessary.’” *Walsh* at 586  
24 (quoting *N. Jersey Media Grp. Inc. v. Pirro*, 74 F. Supp. 3d 605, 621 (S.D.N.Y.  
25 2015)). In support of its finding, the *Walsh* court also cited *Yang v. Mic Network,*  
26 *Inc.*, 405 F. Supp. 3d 537 (S.D.N.Y. 2019), restating that “‘if copying the original  
27 “any less would [make] the picture useless to the story[,]” the substantiality of the  
28 copying is ‘of little consequence.’” *Id.* (quoting *Yang* at 546-47).



1 Indeed, because Hip Hollywood was reporting on Lil Uzi Vert’s social media  
2 post, the presentation of Plaintiff’s photograph in that post was dictated entirely by  
3 Lil Uzi Vert. *See Boesen*, 2020 U.S. Dist. LEXIS 203682, at \*13-14 (E.D.N.Y.  
4 Nov. 2, 2020) (where “the purpose of the story” was “to inform readers about a  
5 celebrity’s “announcement on social media,” “[o]nly reproducing that post could  
6 achieve that aim.”); *Whiddon*, 2022 U.S. Dist. LEXIS 197694, at \*17 (“No other  
7 images could serve the same purpose as the screenshots in the Post.”).

8 This case presents identical facts concerning Hip Hollywood’s use of Lil Uzi  
9 Vert’s Instagram post, as using any less of the photo contained in Lil Uzi Vert’s  
10 post would be useless. Thus, the third fair use factor weighs in favor of Defendant.

#### 11 **4. Effect of Use on Market**

12 The fourth fair use factor focuses on whether the allegedly infringing work  
13 acts as a market substitute for the original work. *Seltzer*, 725 F.3d at 1179. If it is  
14 clear that the use of the allegedly infringing work will have no impact on the  
15 plaintiff’s market, then a finding of fair use is appropriate. *Kelly*, 336 F.3d at 944.  
16 Where transformative use is implicated, it inherently serves a different market than  
17 the original work. *See Seltzer*, 725 F.3d at 1179 (finding “no reasonable argument  
18 that conduct of the sort engaged in by [the defendant] [was] a substitute for the  
19 primary market for [the plaintiff’s] art.”).

20 When evaluating the effect of XXL Mag’s use of the photograph on the  
21 market or value of the underlying work, the *Walsh* court found this last factor to  
22 favor defendant’s fair use “because the Photograph did not appear on its own, but as  
23 part of the Post, alongside text and another image, it is implausible that Defendant’s  
24 use would compete with Plaintiff’s business or affect the market or value of her  
25 work.” *Walsh* at 586 (citing *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d  
26 Cir. 2015); *Yang* at 548; *Clark v. Transportation Alternatives, Inc.*, No. 18 CIV.  
27 9985 (VM), 2019 WL 1448448, at \*4 (S.D.N.Y. Mar. 18, 2019)).



1 Here, Hip Hollywood's use of Plaintiff's photo likewise (1) did not appear on  
2 its own, but as part of Lil Uzi Vert's Instagram Stories post, (2) appeared  
3 superimposed with Lil Uzi Vert's textual comment, and (3) appeared alongside the  
4 indicators that it was a post made to Instagram by Lil Uzi Vert about 6 hours before  
5 the screenshot was made, including the superimposed photographic icon indicating  
6 Lil Uzi Vert is the poster. "Additionally, the post used a cropped low-resolution  
7 version of the photograph that would be a poor substitute for the original." *Boesen*,  
8 2020 U.S. Dist. LEXIS 203682, at \*15.

9 Just as there was little risk that someone looking to license the image of Cardi  
10 B at issue in *Walsh* would select Cardi B's post instead of the original image  
11 (*Walsh* at 586), there is little risk that a licensee would select Hip Hollywood's use  
12 of Lil Uzi Vert's Instagram Stories post en lieu of licensing Plaintiff's work.  
13 Therefore, the fourth fair use factor weighs in favor of Defendant.

#### 14 **B. PLAINTIFF'S COMPLAINT CANNOT BE CURED BY AMENDMENT**

15 When a motion to dismiss is granted, the court must decide whether to grant  
16 leave for the plaintiff to amend its complaint. Although the Ninth Circuit has a  
17 liberal policy favoring amendment, *see, e.g., DeSoto v. Yellow Freight Sys., Inc.*,  
18 957 F.2d 655, 658 (9th Cir. 1992), a court need not grant leave to amend when  
19 permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman*  
20 *Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of  
21 leave to amend is not an abuse of discretion where the pleadings before the court  
22 demonstrate that further amendment would be futile.").

23 Here, Plaintiff would still be unable to demonstrate that Defendant infringed  
24 its work because Defendant's use of a screenshot of Lil Uzi Vert's Instagram  
25 Stories post that used Plaintiff's work is clearly a fair use. Therefore, it would be  
26 futile to grant Plaintiff leave to amend its fatally defective complaint.

#### 27 **IV. CONCLUSION**

28 For all the foregoing reasons, Plaintiff's Complaint should be dismissed with

1 prejudice, and the Court should issue an order to show cause for why Defendant  
2 should not be awarded its reasonable costs, including attorneys' fees, under section  
3 505 of Title XVII of the United States Code. *See Stern v. Does*, 978 F.Supp.2d  
4 1031, 1050 n. 13, 1052 (C.D. Cal 2011); *Kirtsaeng v. John Wiley & Sons, Inc.*, 136  
5 S. Ct. 1979, 1989 (2016) (courts may award fees to deter "overaggressive assertions  
6 of copyright claims").

7  
8 Dated: November 28, 2022

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